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ROSLEY JOHNNY v. PP

HIGH COURT SABAH & SARAWAK, SIBU
CHRISTOPHER CHIN SOO YIN J
[CRIMINAL APPEAL NO: SBW-41S-3-7-2022]
30 SEPTEMBER 2022

B

Abstract – *The requirement for the detention tenure in Henry Gurney School, to be for three years pursuant to s. 75 of the Child Act 2001, is not absolute in light of the provision for a shortening of such period by the Director-General of Prisons.*

C

CRIMINAL LAW: *Offence – Rape – Appeal against sentence – Accused and victim minors engaging in consensual sex – Victim became pregnant and abandoned infant – Accused sentenced to three years in Henry Gurney School – Whether sentence meted out excessive – Penal Code, s. 376(1)*

D

STATUTORY INTERPRETATION: *Statutes – Child Act 2001 – Section 75 – Detention – Accused and victim minors engaging in consensual sex – Victim became pregnant and abandoned infant – Accused sentenced to three years in Henry Gurney School – Whether requirement of detention for tenure of three years absolute*

E

The appellant and his girlfriend ('victim') were minors who had engaged in consensual sex after the victim made the deliberate act of visiting the appellant late at night at his place of residence. This resulted in the victim carrying a child. The infant was delivered in a bathroom and the victim, in a state of panic, left the infant in some nearby bushes. The infant was, however, discovered and this led to the tracing of the victim who then lodged a police report against the appellant. The appellant was charged with rape, at the Magistrate's Court, an offence under s. 376(1) of the Penal Code. At the conclusion of the trial, the appellant was sentenced to three years in Henry Gurney School. Hence, the present appeal. The appellant sought for a revision of the proceedings at the Magistrate's Court and appealed against the sentence meted out.

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Held (allowing appeal; reducing sentence from three years in Henry Gurney School to six months):

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(1) There were no issues of correctness, legality or propriety of any finding, sentence, order or regularity of any proceedings in the lower court that warranted the exercise of the court's discretion of revision under s. 323 of the Criminal Procedure Code. (para 6)

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(2) The requirement for the detention to be for the tenure of three years is not absolute, despite the use of the phrase 'the order shall' in s. 75 of the Child Act 2001 ('Act'), for the simple reason that s. 75(3) of the Act

provides for the shortening of the period of detention by the Director General ('DG') of Prisons '… for reasons which appear to him to be sufficient'. The sentence of detention primarily emanated from the court and not from the DG of Prisons. Section 75 of the Act cannot be construed as limiting the inherent jurisdiction of the court; in this case, in its judicial discretion in sentencing. (paras 27, 28 & 30)

(3) The sentence meted out by the Magistrate was manifestly excessive and unsuitable, given the facts and circumstances. The fateful intimacy was consensual and there was no coercion or violence against the victim. Nevertheless, acknowledging that the offence had been committed and was a serious one, the order that the child be sent to Henry Gurney School was maintained and affirmed but the tenure was varied from three years to six months. (paras 31-34)

Obiter:

(1) Who was responsible for such discipline of the appellant, a child, at his tender age? The fault did not lie solely on the child. The persons at fault were the parents, the authorities for allowing the child to leave school after Form 1 and the society in which the child was brought up in. It was unconscionable to punish the child for the obvious omissions of the child's parents, the education authorities and society. (paras 25 & 26)

Case(s) referred to:
Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(refd)***
Dookes v. DPP [2010] SCJ 71 ***(refd)***
Gek Sing Kaliappan v. PP [1999] 4 CLJ 292 HC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***

Legislation referred to:
Child Act 2001, ss. 75(3), 91
Courts of Judicature Act 1964, s. 22
Criminal Procedure Code, ss. 316, 323
Dangerous Drugs Act 1952, s. 39B
Federal Constitution, arts. 4(1), 121(1)
Penal Code, ss. 300, 302, 376(1)

Other source(s) referred to:
Ho Mooi Chin, *Sentencing Practice in Malaysia*, 2nd edn, pp 89 et seq, Sweet & Maxwell

For the appellant - Terence Tiong & Esther Wong; M/s Stephen Robert & Wong Advocs
For the respondent - Mark Kenneth Netto; DPP

Reported by Najib Tamby

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JUDGMENT

Christopher Chin Soo Yin J:

Background

[1] The appellant (the accused in the proceedings below), then a minor
B was charged under s. 376(1) of the Penal Code for having consensual sex with his girlfriend ("the victim") also a minor. Both her parents and the accused were not aware that she was with child. She delivered the infant alone in the bathroom of a rented house near Jalan Mission in Song and in a state of panic left the infant in some nearby bushes. Happily, the infant was mercifully
C discovered and is now thriving under the care of its relatives. Following the discovery of the infant, the victim was traced who then lodged a police report against the accused/appellant.

[2] The appellant shall henceforth be referred to as "the child".

D **[3]** It is the child, the proven father (by DNA sampling) who is on trial and not the alleged victim.

[4] The unrepresented child pleaded guilty on 6 April 2022 but sentencing was deferred pending the receipt of the probation reports. On 28 June 2022, the learned Magistrate at Kapit, concurred with the recommendation in the
E probation report and sentenced the child to three years in Sekolah Henry Gurney.

[5] The child then engaged counsel who made two applications. Firstly, the child sought this court's discretion for a revision of the proceedings in the Magistrates Court. Secondly, he appealed to this court against the
F sentence meted by the lower court. In conjunction with the appeal, the child also sought a stay of the sentence but the learned Magistrate refused the stay in the absence of evidence of special circumstances.

Decision On The 16 August 2022

G **[6]** On 16 August 2022, and having studied the record of appeal, I did not find any issue of correctness, legality or propriety of any finding, sentence or order or regularity of any proceedings in the lower court that warrant my exercising my discretion of revision under s. 323 of the Criminal Procedure Code.

H **[7]** However, I allowed the appeal against the sentence and ordered a reduction of his sentence from three years in Sekolah Henry Gurney to six months.

[8] The prosecution now appeals against my decision in varying the sentence.

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Key Facts

[9] The child was charged as follows:

> That you, on the 7th February 2021, at about 1100 hrs, at an unnumbered house at Rumah Panjang Muni Rua, Song, in the District of Song, in the State of Sarawak, committed rape against one IL (NRIC No. xx-xx-xx) aged 15 years and 7 months and thereby you have committed an offence punishable under s. 376(1) of the Penal Code.

[10] At the age of 15, the child was two months older than the victim at the time of the statutory rape.

[11] The following pertinent facts were found by the learned Magistrate from his grounds of decision as well as the facts of the case extracted from the record of appeal, all of which persuaded this court to come to the decision it did.

(i) The victim was born on the 30 June 2005 (based on her identity card) and delivered the child on the 23 November 2021 when she was 16 years old, meaning the statutory rape occurred when she was 15 years old.

(ii) The child was born on the 23 April 2005 (based on his identity card number) meaning he was barely two months older than the victim;

(iii) It was the victim who visited the child late on the night the statutory rape occurred:

> Bermula dari perkenalan tersebut pada 1 Februari 2021 lebih kurang pukul 11.00 malam bertempat di bilik tidur tertuduh di sebuah rumah tidak bernombor rumah Panjang Muni Rua, Song tertuduh telah merogol mangsa dengan cara memasukan zakar pengau ke dalam faraj mangsa. Akibat daripada hubungan seks tersebut mangsa telah mengalami kehamilan dan melahirkan bayi.

(iv) there is no evidence that the child forced himself on the victim. The facts above disclose that it was the victim that made the deliberate act of visiting the child late at night and at the child's place of residence in the longhouse;

(v) the child pleaded guilty and understood the nature and consequences of his plea;

(vi) the child was the youngest in a family of four and had left school after Form 1 to work as a mechanic to financially support his family with a monthly income of about RM900 despite being the youngest in the family;

(vii) the child was a first-time offender;

(viii) DNA profiling proved that the child was the biological father of the infant;

(ix) the child had never previously caused any problem to his family;

(x) the child was treated as an adult by his family before his time as he was not free to attend school as he was expected;

(xi) the child did not know that the victim was pregnant with his child and stated in mitigation that had he known of such fact, he would have taken responsibility.

Sentence Allowed By Law

[12] When the time came for sentencing, the child had engaged counsel and went to great lengths to plead that the child be placed on bond of good behaviour. I need not go into discuss such arguments as it does not relate directly to my decision.

Section 22 Courts Of Judicature Act 1964

[13] The criminal jurisdiction to sentence vested in the High Court is as stated in s. 22 of the Courts of Judicature Act 1964 where:

Section 22(2):

The High Court may pass any sentence allowed by law.

Section 75 Child Act 2001

[14] The Child Act 2001 stipulates that the detention tenure in Henry Gurney School to be for at least three years with provision for a shortening of the period by the Director General of prisons:

Section 75

When a child can be sent to Henry Gurney School

7.(2) if a court for children orders a child aged fourteen years or above to be sent to a Henry Gurney School:

(a) the order shall be:

(i) **an authority for his detention for a period of three years from the date of the order**; and

(ii) valid for his detention up to but not after he has attained the age of twenty-one years; and

(3) notwithstanding subsection (2), **the Director General of prisons may, in his discretion**:

(a) shorten the period of detention of a child in a Henry Gurney school for reasons which appear to him to be sufficient; or

(b) release any such child with permission for such period and upon such conditions as he may deem fit to impose.

(emphasis added)

Section 91 Of The Child Act Goes On To Say

The Law On Appeal As Provided In The Criminal Procedure Code

[15] The duty upon a court hearing an appeal from a subordinate court is set out in s. 316 of Criminal Procedure Code:

> 316. Decision on appeal
>
> At the hearing of the appeal the judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) In an appeal from an order of acquittal reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) In an appeal from a conviction or in an appeal as to sentence;
>
> (i) reverse the finding and the sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) In an appeal from any other order, alter or reverse such order.

Appellate Court Should Be Loath To Interfere With The Sentence Of A Lower Court

[16] However, the law is clear, in that I should not disturb the sentence meted out by the trial judge merely just because I would have given a heavier or more severe sentence had I been the trial judge and given the facts of the particular case.

[17] This was held in the case of *Gek Sing Kaliappan v. PP* [1999] 4 CLJ 292; [1999] 6 MLJ 641:

> In an appeal on sentence from the subordinate courts, the High Court will not interfere with the sentence imposed, even if it felt that a higher or lower sentence would be more appropriate, unless it can be shown to its satisfaction that in the circumstances of the particular case, the sentence was manifestly excessive or inadequate or that in fixing the sentence, the subordinate court had failed to adequately consider all relevant factors, either for or against the offender ...

[18] In the case of *Dookes v. DPP* [2010] SCJ 71 at para. 177 the Court of Appeal there ruled:

> ... sentencing is not a science of mathematical application of any set formula. It is a normative science rather than a physical science which takes into account the circumstances of the offender as well as the offence, the impact of the offence on the community. A sentence may look to be lenient because it is tailored to fit the offender on the facts of the particular case ...

A **Circumstances Justifying Interference With Sentence**

[19] An appellate court may interfere with the sentence of a lower court where, for example, and pertinent to this case:

(i) it is manifestly excessive or inadequate;

B (ii) it is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances;

(iii) the trial judge had fallen into error by taking into consideration irrelevant matters, or, by committing some error in law;

C (iv) the sentencing judge has erred as to the proper factual basis and in appreciating the materials placed before him;

(see *Sentencing Practice in Malaysia* (2nd edn) by Ho Mooi Chin, at pp. 89 *et seq*, Sweet & Maxwell)

D **Application Of The Principles Of Sentencing On Appeal As Against The Grounds Of Decision Of The Learned Magistrate**

[20] I now analyse the reasoning of the learned Magistrate as against the above principles to see if this is a case which merits appellate interference to the sentence.

E **[21]** The learned Magistrate appeared, in his grounds of judgement, to have been influenced by the actions of the victim in dumping the baby in the bushes, when in fact the victim is not the one on trial, nor were the two young lovers jointly charged:

F > [25] It must be emphasised that the mitigating circumstances advanced by the defence counsel had only focused on the child offender himself but failed to mention anything about the victim and the baby. It must be a horribly unpleasant experience for the victim to go through pregnancy alone and delivered the baby on her own in the toilet near her place of residence at that time. This had led the victim to dump the baby at the
G > bushes behind her place of residence. Now that the child offender knows that he has fathered the victim's child, the mitigating factors, if relevant, could have been derived from his actions of owning up to his responsibility as the father of the baby.

[22] However the learned Magistrate had earlier in his grounds already
H conceded that the child was not aware that he had fathered a child with his girlfriend, the victim:

> [24] (paraphrasing) It is obvious from the probation report that the child offender was treated as an adult way by his family before his time as he was not free to attend school because he was expected to provide
I > financial aid to his family ... The child Offender, when interviewed by the Welfare officer, had also stated that if he had known that the victim was

> pregnant, he would have accepted responsibility (see page 5 of P8 ... Sekiranya penama dimaklumkan berkenaan dengan perkara ini, sudah pasti penama akan bertanggungjawab ...).

[23] Hence the consideration taken by the learned Magistrate in para. 25 of his grounds that the child did not plead in mitigation that he would have taken responsibility of the victim's pregnancy was erroneous.

[24] I believe the crucial observation by the learned Magistrate in coming to his decision in sentencing in this case can be found in para. 27:

> [27] It appears to me that the child Offender had not been taught of the necessary discipline at his tender age since he had stopped schooling alter Form 1 and started working as a mechanic thereafter. Further, there was no special arrangement made by his parents after this incident to ensure that the future upbringing of the child offender is in a beneficial state in which he can flourish and have a healthy development in his formative years

[25] But who is responsible for such discipline of the child at his tender age? This sentiment by the learned Magistrate evidence that the fault does not lie solely on the child.

[26] The learned Magistrate accepted that the offence was committed due to the lack of parental or moral guidance for the child. Put in perspective, the persons at fault in this case are the parents, the authorities for allowing the child to leave school after Form 1 and society in which the child was brought up in. It is unconscionable for this court to punish the child for the obvious omissions of the child's parents, the education authorities and society.

Can The Detention Be Less Than Three Years As Required In Section 75 Of The Child Act 2001?

[27] Firstly, the requirement for the detention to be for tenure of three years is not absolute despite the said s. 75 use of the phrase that "the order shall" for the simple reason that s. 75(3) of the same Act provides for a shortening of the period of detention by the Director General of prisons ".... for reasons which appear to him to be sufficient."

[28] Secondly, the sentence of detention primarily emanates from the court and not from the Director General of prisons. The court has a duty to pass a sentence which is consonant with the facts or circumstances of the case before it. The punishment must suit the crime and it is the court who exercises this discretion by considering the classical sentencing principles of retribution, deterrence, prevention and rehabilitation.

[29] Thirdly, the courts have always guarded and protected its discretion in meting out punishment despite the requirement that the sentence passed must be in accordance with the law. In *PP v. Jafa Daud* [1981] 1 LNS 28;

[1981] 1 MLJ 315, Mohamed Azmi J (as he then was) explained that a "sentence according to the law" means that the sentence must not only be within the ambit of the punishment section, but it must also be assessed and passed in accordance with established judicial principles.

[30] Fourthly, unlike offences under s. 39B of the Dangerous Drugs Act 1952 or ss. 300 and 302 of the Penal Code (Act 574), where once the principle ingredients of the offence are proven beyond reasonable doubt only one sentence is available to be passed. In these legislations, the sentences were specifically prescribed for the offences. Section 75 of the Child Act 2001 providing for detention with Henry Gurney School is not specific for any wrongdoing by the child. It is "punishment" by way of detention of general application guided by the age of the offender as being above fourteen years old. Hence, s. 75 of the Child Act cannot be construed as limiting the inherent jurisdiction of the court, in this case, in its judicial discretion in sentencing. Such sacrosanct inherent jurisdiction of the courts was re-stated and jealously guarded in the recent Federal Court's decision in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1 (see paras. 202 *et seq*) with reference to the "source and scope of judicial power" under arts. 4(1) and 121(1) of the Federal Constitution.

Decision

[31] Given the circumstances of the child and the facts of the case, and after appreciating that the learned Magistrate had erred in his consideration of the facts in this case, in particular the circumstances of both the child as well as how the offence was committed, I am of the view that the sentence meted by him was manifestly excessive and unsuitable given the facts and circumstances. The learned Magistrate had fallen into error by taking into consideration irrelevant matters and failing to appreciate the facts placed before him.

[32] Nevertheless, acknowledging that the offence has been committed and is a serious one that the order that the child be sent to Henry Gurney School is maintained and affirmed.

[33] However, the detention of three years prescribed by s. 75 of the Child Act 2001 unfairly punishes the child for the clear shortcomings of his parents, the education Ministry as well as the community he was brought up in. He is a first-time offender and he pleaded guilty. The fateful intimacy was not only consensual but was triggered when the victim visited him alone late at night. There was no coercion or violence against the victim.

[34] I therefore exceptionally vary his detention in Henry Gurney School from three years to six months so that he can re-join society to support his family and also to victim and the child he has fathered child.

[35] After he has completed his detention in Henry Gurney School that he continues for a period of two years from the date of his sentencing on the 28 June 2022 to report once a month to the police station at Song.

Postscript

[36] In addition, I order that the Director General of prisons to shorten the child's tenure of detention in Henry Gurney school from 36 months to six months as allowed under s. 75(3) of the Child Act 2001.